July 12, 2003

Noteworthy

- No-Comment Is Common at Hearings for Nominees; David E. Rosenbaum; *New York Times*; July 12, 2005
- Adhere to the Democratic standard; *Washington Times*; July 12, 2005

"He is reaching out aggressively. He or his staff contacted over 60 United States Senators, each member of the judiciary committee over half or 2/3 of the Democrats. The process will continue and this was very important to do today, but it's a process that the President and we discuss as a process that will continue over the coming days. And, fourthly, from the Senate perspective, we're ready. We made it clear to the president that we expect a process in the United States Senate that is fair, that treats the nominee with dignity and respect and that will be conducted in a timely way with there being a general agreement that we would have the nominee on the Supreme Court by early October."
-Majority Leader Frist, remarks following meeting with President, 7/12/05

"We're following the constitution which is always a good start. Advice and consent; I think that this morning was productive with the advice part with the President inviting us in promptly to talk about the entire process. The scheduling is a matter which we took up in some detail and Senator Leahy and I have worked coordinately and we intend to continue that. I'm flexible. There are some limitations as to August, but as Senator Frist has said, our duty is to have a justice in place by the first Monday in October when the court starts its new term."
-Chairman Specter, remarks following meeting with President, 7/12/05

"I applaud President Bush for talking with Senators from both parties about the Supreme Court vacancy, and hope that this cooperation will continue as a nominee is selected and the confirmation process begins."
-Senator Byrd, released statement, 7/7/05

"I'm delighted by their willingness to consult."
-Senator Feinstein, *Congressional Quarterly Today; Legal Affairs*, 7/12/05

No-Comment Is Common at Hearings for Nominees

By DAVID E. ROSENBAUM
July 12, 2005
New York Times

WASHINGTON, July 11 - Each time senators asked Sandra Day O'Connor about her views on a specific topic like abortion during her Supreme Court confirmation hearings in 1981, she looked down at a piece of paper that had been prepared for her and read, "I do not believe as a nominee I could tell you how I would vote."

This response, known in the Senate as "taking the judicial Fifth," has been recited in one form or another by every recent Supreme Court nominee, and it is almost certain to be used this year by whomever President Bush chooses to replace Justice O'Connor.

It is bound to frustrate some senators and interest groups, since the new justice will be the swing vote on important issues like affirmative action, the role of religion in public life, states' rights, environmental protection and laws on partial birth abortion.

But as a practical matter, senators have no real recourse when a nominee declines to answer questions. They can hardly refuse to confirm the nominee on that ground alone, since so many other justices who have been noncommittal on the issues of the day have been approved.

In 1986, for instance, Antonin Scalia refused even to say whether he subscribed to the principle of Marbury v. Madison, the fundamental decision in 1803 that established the authority of the Supreme Court to strike down laws as unconstitutional. The Senate confirmed him unanimously.

Senators opposed to the president's selection are not likely to be deterred from asking relentlessly about what the nominee believes. "This is one of the most important positions in the government," said Senator Charles E. Schumer of New York, who sits on the Judiciary Committee and is chairman of the Democratic Senatorial Campaign Committee. "We have a right to expect a good degree of specificity."

Senator Edward M. Kennedy, Democrat of Massachusetts, who as a member of the Judiciary Committee has questioned every Supreme Court nominee since the Johnson administration, said that if President Bush picked a candidate because of his or her judicial philosophy - about as safe a bet as can be placed in today's political climate - then senators deserved to learn about that philosophy.

But Senator Orrin G. Hatch of Utah, a senior Republican on the committee, said his side would resist such questioning and give support to a nominee who declined to answer. "What's important is, are they qualified?" Mr. Hatch said. "Judicial philosophy is important, but that's why we elect presidents. The president has the sole power of appointment, and he's within his right to choose nominees who have his judicial philosophy."

The way these senators view the matter is not surprising. Invariably, said Henry J. Abraham, an emeritus professor of government at the University of Virginia and an authority on Supreme Court confirmation battles, senators in opposition want nominees to face as many questions as possible, while the president and his allies want to avoid anything that might derail the nomination.

Mr. Kennedy took a different tack in 1967, when he was supporting Johnson's nomination of Thurgood Marshall to be an associate justice. Then, Mr. Kennedy argued that judicial philosophy was not a proper line of questioning and that senators should stick to examining the candidate's "background, experience, qualifications and temperament."

The senator who has consistently been most outspoken over the years in his belief that candidates for the Supreme Court should undergo rigorous scrutiny by the Senate is Arlen Specter, who is now chairman of the Judiciary Committee.

In his autobiography, "Passion for Truth," published in 2000, Mr. Specter, a Pennsylvania Republican, wrote that the Senate should reject nominees who refuse to "answer questions on fundamental issues" and added: "In voting whether or not to confirm a nominee, senators should not have to gamble or guess about a candidate's philosophy but should be able to judge based on the candidate's expressed views."

Since the court vacancy occurred, Mr. Specter has not publicly addressed the proper range of questioning, so it is not clear whether he still holds the position he took in his book.

Mr. Specter's views were shaped in large part by his experience questioning Robert H. Bork, an appeals court judge whom President Ronald Reagan nominated to the Supreme Court in 1987.

At the outset of his confirmation hearings, Judge Bork declared, "I cannot, of course, commit myself as to how I might vote on any particular case." But Judge Bork had written and spoken extensively and provocatively on issues like free speech, sex discrimination, "equal protection of the laws," abortion and sexual privacy, and there was no way he could escape questions on such matters. Mr. Specter was especially aggressive in his questions, and Judge Bork often recanted and qualified his controversial views in ways that satisfied no one.

The Senate rejected the nomination, 58 to 42, with Mr. Specter voting against his fellow Republican. In the aftermath, Judge Bork said that the intense questioning of him on constitutional issues was improper and that the only people who could stand such scrutiny and be confirmed were those with such thin records on constitutional topics that they could duck the questions.

That proved to be prescient three years later, when President George Bush picked David H. Souter for the court. Mr. Souter had been a Supreme Court justice in New Hampshire

and had essentially no record on constitutional issues. When topics like abortion came up at his hearings, Mr. Souter took the "judicial Fifth," and he won confirmation from a Senate controlled by Democrats.

To the disbelief of some senators, Clarence Thomas, also nominated by the first President Bush, said he had never really thought about or discussed whether Roe v. Wade, the ruling establishing a constitutional right to abortion, had been decided properly.

Ruth Bader Ginsburg, who had been a pioneering lawyer in the field of sex discrimination and abortion, gave full and often provocative answers to questions in this area. She said, for example, that the decision on whether to have an abortion was entirely the woman's to make and that the potential father had no legal voice.

But when she was asked about constitutional topics on which she had not written - capital punishment, for example - she declined to answer.

The next nominee will be advised to follow Justice Ginsburg's lead, suggested former Senator Fred Thompson, a Tennessee Republican who has been summoned by the White House to shepherd the nomination through the Senate.

Asked last week in a CNN interview whether the nominee would be forthcoming in confirmation hearings, Mr. Thompson replied, "A senator can ask absolutely anything that he or she wants to."

But as for answers, Mr. Thompson said, those "outside the bounds of, maybe, what somebody's already written in a judicial opinion, would not be appropriate."

Neil A. Lewis contributed reporting for this article.

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Adhere to the Democratic standard

Washington Times

July 12, 2005

Today President Bush will meet with Senate leaders -- Majority Leader Bill Frist, Minority Leader Harry Reid, Judiciary Committee Chairman Arlen Specter and Patrick Leahy, the committee's ranking Democrat -- indicative of the White House's recognition of the Senate's "advice and consent" role prescribed by the Constitution. The goal, of course, should be to confirm a successor before the first Monday in October, which traditionally serves as the opening day of the court's new term. Unfortunately, it did not take Mr. Leahy long to begin pouring cold water on that very reasonable schedule.

"[W]e should all remember that Justice O'Connor gave everybody a great gift," Mr.

Leahy told MSNBC's "Hardball" on July 6. "She said she would serve until her replacement is confirmed," Mr. Leahy said, adding, "So, you don't have a tight, tight time schedule, as you might have otherwise."

There should be more than enough time for the Senate to fulfill its constitutional duty. The White House has had four-and-half years to prepare for this nominating moment, and the president's selection should be forthcoming very soon. Mr. Leahy, however, appeared to be laying the groundwork for delay even in the likelihood of an imminent nomination. "[I]t takes a fair amount of time to prepare for one of these hearings," he said. Noting that he had been involved in 11 Supreme Court nominations, Mr. Leahy argued, "Even the easiest ones take a fair amount of time to prepare."

What is a fair standard? Mr. Bush and the Republican-controlled Senate should insist on following the Democratic standard, set by a Democratic president (Bill Clinton) and a Democratic-controlled Senate.

Mr. Clinton nominated Ruth Bader Ginsburg on June 14, 1993. Judiciary Committee hearings began five weeks later on July 20 and ended July 23. The committee unanimously approved the nomination July 29. By a bipartisan vote of 96-3, the Senate confirmed Mrs. Ginsburg five days later on Aug. 3, 50 days after she was nominated. Mr. Clinton nominated Stephen Breyer on May 13, 1994. Four days of Judiciary Committee hearings began less than two months later, ending on July 15. The committee unanimously approved Mr. Breyer on July 19. On July 29, 77 days after he was nominated and following five hours of debate on the Senate floor, Mr. Breyer was overwhelmingly confirmed by a bipartisan vote of 87-9.

Before Mrs. Ginsburg, the last person nominated by a Democratic president (Lyndon Johnson) to be an associate justice of the Supreme Court was Thurgood Marshall, whom the Democratic-controlled Senate confirmed 78 days later by a 69-11 margin. (Ten Democrats, including West Virginia's Robert Byrd, voted against Justice Marshall in 1967.)

The average time period between the date of nomination of those three justices and the date of confirmation was less than 10 weeks. As soon as Mr. Bush makes his selection, the clock should begin ticking. Within 10 weeks, following the Democratic standard, the Senate should complete its confirmation vote.